
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

DANIEL ANTHONY BURNS, also
known as DANIEL ANTHONY JASEK,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 21890 ✓

On Appeal from the Judgment of
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEE

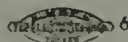
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I.

JURISDICTIONAL STATEMENT OF FACTS

On November 28, 1966, an Indictment was returned by the Federal Grand Jury sitting at Phoenix, Arizona (Transcript of the Record, Volume I, Item 1). (Hereinafter Volume I of the Transcript of Record will be referred to as "RC," Volume II of the Transcript of Record, i.e., the Reporter's Transcript, will be referred to as "RT", the number following will refer

to the page and the number following "L" will refer to the line. Appellant will be referred to as Burns.)

The Indictment charged Burns with having transported a stolen motor vehicle, that is, a 1965 four-door Cadillac DeVille automobile, Vehicle Identification Number B5253136, from Chicago, State of Illinois, to Tucson, State and District of Arizona, on or about October 25, 1966, and that he then knew the motor vehicle to have been stolen, all in violation of 18 U.S.C.A., § 2312 (RC Item 1).

On December 2, 1966, John E. Lindberg was appointed to represent Burns; Burns pleaded not guilty, and trial was set for January 31, 1967 (RC Item 15).

On January 12, 1967, Burns filed a Motion to Reveal Name of Informer (who informed the FBI of his whereabouts) (RC Item 2). (Burns was a fugitive from the Western District of New York, and claimed the FBI must have had an informer who told them of his whereabouts.) On January 18, 1967 the Government filed a Memorandum in Opposition (RC Item 3).

On January 23, 1967, the Court heard the Motion to Reveal Name of Informer and the Motion was denied (RC Item 15). On January 30, 1967, the Government moved for a continuance and it was granted to February 2, 1967 (RC Item 15). On February 2, 1967, the trial was reset for March 7, 1967, at the request of Burns (RT 5 L 8-12; RC Item 15). On March 7 and 8, 1967, trial was held; Judge William J. Lindberg, sitting (RC Item 15). On March 8, 1967, the jury returned a verdict of guilty (RC Item 6). On March 13, 1967, Burns filed a Motion for Judgment of Acquittal or for New Trial on the grounds the verdict was not supported by sufficient admissible evidence and was not supported by the evidence (RC Item 7). On March 16, 1967, the Government filed a

Memorandum in Opposition (RC Item 8). On March 17, 1967, the Court entered a judgment of guilty and sentenced Burns to five years under 18 U.S.C.A., § 4208(a)(2), said sentence to begin to run at expiration of the sentence imposed in the Western District of New York (RC Item 9). On March 22, 1967, Burns attempted to file a Notice of Appeal, but which was endorsed by the Clerk (RC Item 13). On April 7, 1967, Burns filed a Motion to Reduce Sentence and petitioned to appeal in forma pauperis (RC Items 10 and 11). On May 3, 1967, the Court entered an Order granting an Appeal in Forma Pauperis (RC Item 12).

This appeal is pursuant to the provisions of 28 U.S.C.A., § 1291.

II.

STATEMENT OF FACTS

Robert W. Bycraft, a resident of Chicago, Illinois, parked a 1965 Cadillac he had bought for his wife across the street from their apartment in Chicago, Illinois, at about 9:30 in the evening of August 17, 1966 (RT 18-19). He locked the ignition and the doors (RT 19 L 20-25). He went out the following day, August 18, 1966, at about 4:00 o'clock in the afternoon to move the car and found it missing (RT 20, L 1-11). He still has the two complete sets of keys (RT 20 L 12-15). He gave no one permission to take the car and did not recognize Burns (RT 20 L 16-20). The third page of Government's Exhibit 1 was identified by Mr. Bycraft as the Illinois Certificate of Title to his missing car. He verified the vehicle identification number, B5253136, in the exhibit as the vehicle identification number of his car (RT 22 L 2-6). On cross-examination he was asked if he looked at the serial

numbers of the Cadillac and he replied he had not committed them to memory. Mr. Bycraft identified the other documents in Government's Exhibit 1 in evidence (the first two pages were the authentication of the documents) after the Illinois Certificate of Title (RT 24 L 20-24). The next document was the application for an Illinois State license (RT 25 L 2-8). The next document was the application for a transfer of the Illinois State license plate of Bycraft on his old Cadillac to the 1965 Cadillac (RT 25 L 20-24). And the next document was the Certificate of Origin, which is a document that is needed in order to obtain a Certificate of Title in Illinois (RT 26 L 6-19).

Hugh Barrasso, a resident of Tucson, Arizona, testified he is a salesman for the Cadillac-Oldsmobile dealer in Tucson, and that the car agency also sells used cars (RT 29 L 4-17). Barrasso recognized Burns as Daniel Jasek from whom he personally purchased a 1965 Cadillac for \$3500.00 in mid October, 1966, which Burns had brought to the dealer's lot (RT 29 L 23 to 33 L 13). Burns bought from the dealer a used 1963 Oldsmobile for \$1895.00, plus tax and license (RT 32 L 16-25). Burns had a Virginia title to the 1965 Cadillac (RT 34 L 21-23). On cross-examination Barrasso testified there were three meetings with Burns prior to the actual purchase; first, at the car lot, then at Burns' apartment, and then at the lot again (RT 39-45). Barrasso had an employee drive the Cadillac downtown to have it checked by the State Motor Vehicle Department while Burns test drove the Oldsmobile (RT 48-50). Barrasso did not believe he informed Burns that he had had this done (RT 49 L 17-21). Burns' attorney brought out, over objection, that Barrasso saw Burns in the County Jail about a month after the purchase of the 1965 Cadillac and the Cadillac had been taken from him by legal process (RT 51-53). The salesman, Barrasso, did not

check the numbers of the Cadillac himself (RT 55 L 23 to 56 L 2). Barrasso testified the vehicle identification number appears on the door plate and the engine block, but did not know of a secret number (RT 56 L 3-14). Burns' attorney withdrew his objection to that part of Government's Exhibit 1, which was the assignment of the title to Travelers Insurance Company, since Burns' attorney had brought out from Barrasso that Travelers Insurance Company had obtained the Cadillac from Barrasso by legal process (RT 57-58).

Bill Metzger testified he is employed by the National Automobile Theft Bureau, which is a non-profit organization supported by insurance companies and which assists law enforcement agencies in the investigation of automobile thefts, salvage rings, and fraudulent fires; and they participate in the training of police officers in Phoenix and Tucson, and of the Arizona Highway Patrol officers (RT 59-60). By a salvage ring operation, Metzger explained, is meant the process by which wrecked vehicles are purchased and the identification or serial numbers are taken off of them and placed on stolen vehicles (RT 60 L 8-13). Bill Metzger also gave his training and experience in automobile identification, and the number of times he had qualified in court as such an expert (RT 60-61). Metzger testified as to his study of how Cadillacs, and particularly how 1965 Cadillacs, are marked with the vehicle identification numbers (RT 63). The 1965 Cadillac he examined at Paulin Motor Company in Barrasso's presence, and in the presence of FBI Agent Don Slattum, did not have an asterisk before and after the vehicle identification number stamped on the engine block, and was also not aligned and was not the same size as Metzger had learned (RT 64-65).

Metzger then identified Government's Exhibit 5, which he had "lifted" from the 1965 Cadillac Barrasso had in his

possession at the time he, Metzger, examined it in the presence of Barrasso and FBI Agent Slattum (RT 65-68). It is "lifted" by spreading graphite over the area and then placing Scotch tape over the area, peeling it off and placing it on a piece of paper (RT 66 L 13-16). The secret number on Government's Exhibit 5 is the same as the serial number of Mr. Bycraft's car, i.e., B5253136 (RT 87 L 24 to 88 L 1). Government's Exhibit 5 was admitted into evidence (RT 89 L 19).

On cross-examination of Metzger it was brought out he had never been to the Cadillac Motor Company's factory (RT 83 L 14-17).

The defense consisted of the testimony of three witnesses, Burns himself, Mary Cross and Nancy Mayland.

Burns testified he left Chicago in April or May of 1966 in a rented Chevrolet in the company of Nancy Mayland (RT 90-91). From Chicago they went to Hopkinsville, Kentucky, and from there to Nashville, Tennessee. From Nashville they went to Indianapolis (RT 91). At Indianapolis he met Paul Lawrence and Jerry Green. Burns gave the rented car to Green to return it to Chicago (RT 92).

Burns testified he left Chicago because he was arrested for the theft of a car in Chicago while he was in New York State being tried for the theft of several automobiles and for which he was convicted, and appealed (RT 93 L 14-25). He had been released on bond pending appeal and also had been released on bond on the Chicago charge at the time he left (RT 94).

Burns testified he had not returned to Chicago after he left in April or May (RT 96). He obtained the 1965 Cadillac in Louisville, Kentucky, around August 25, 1966, from Paul Lawrence (RT 96 L 21-25). The car was given to Burns in

part payment of money owed to Burns by Lawrence (RT 97 L 3-10). The car was registered in the name of Spires' son-in-law, Daniel Jasek (RT 97 L 11-20). (Spires was a man who had accompanied Lawrence.) Spires had told Burns his son-in-law had gone to Viet Nam and Spires was to dispose of the car (RT 97 L 23 to 98 L 3). Burns was shown a West Virginia title by Spires and he called the West Virginia Motor Vehicle Department to verify it was registered there (RT 98-100). Burns drove Spires to Clarksville, Tennessee (RT 100-101). Burns and Miss Mayland arrived in Tucson the end of August, stopping in El Paso (RT 101). Burns sold the car ultimately to Barrasso (RT 101-103). Burns knew the car would be taken in for a motor vehicle inspection (RT 104). Burns did not know the 1965 Cadillac was stolen (RT 105 L 11-13), and he didn't know because he wouldn't have taken it from Paul Lawrence since he had "just been convicted in New York City, having to do with automobiles that were stolen." (RT 105 L 18-20).

On cross-examination it was brought out Burns had twice been convicted of a felony (RT 106). Burns testified Lawrence owed him \$5000.00 for tractor and trailer parts he had furnished Lawrence, but was not able to use this money for his appeal (RT 106-107).

He was asked if at the time of his arrest by three FBI agents he told the agents he had purchased the Cadillac from a man whose name he did not know for \$4100.00. This he denied (RT 115).

Mary Cross, the Superintendent of Titles for the Motor Vehicle Division of the Arizona Highway Department, identified records from her office, Defendant's Exhibit C, as an application for an Arizona Certificate of Title based on a West Virginia Certificate of Title (RT 117-119). Title was never

issued at the request of Mr. Metzger of the National Auto Theft Bureau (RT 119). Miss Cross wrote to West Virginia to verify their title and received a copy of a bill of sale which was not certified. Over Government's objection as to foundation, the West Virginia records were admitted by the Court (RT 119-124). On cross-examination, Miss Cross testified she did not know the requirements in West Virginia for the issuance of titles to out-of-state vehicles (RT 126).

Nancy Mayland testified she and Burns left Chicago in a rented Ford (RT 128 L 7). They left Chicago in early April and arrived in Tucson the first week in September in a 1965 Cadillac (RT 128). The Cadillac was acquired in Kentucky or Tennessee from Paul Lawrence as part payment of a debt (RT 128-129). She stated he called West Virginia from a motel room to verify the title (RT 130). (Burns had said he made the call from a public phone and not the motel room, RT 109 L 11-14.) She testified to the conversation between Burns and Lawrence in August concerning the car (RT 136), and taking a friend of Lawrence's home (RT 137).

The Government offered the testimony of Raymond P. Peters, Jr., a Special Agent of the Federal Bureau of Investigation, who testified that Burns, on being arrested as a fugitive, stated he had obtained the Cadillac in June or July for \$4100.00 from a man he did not recall (RT 145 L 10-17).

III.

OPPOSITION TO SPECIFICATION OF ERRORS

1. The Court did not err in permitting testimony relative to the method of application and appearance of Cadillac identification numbers.

2. The Court did not err in denying Appellant's Motion for Acquittal and for a New Trial.

3. The verdict of the jury was supported by substantial, admissible evidence.

IV.

ARGUMENT

The verdict was supported by substantial, admissible evidence.

Appellant concedes that on appeal the evidence is construed in the light most favorable to the Government. *Glasser v. United States*, (1942), 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680; *Schino v. United States*, (9th Cir., 1953), 209 F.2d 67 at p. 72.

Appellant contends it was error to admit the testimony of Metzger, the National Auto Theft Bureau Agent, as to how 1965 Cadillacs are marked. Metzger stated at page 63, lines 1 to 15, as follows:

"Q (By Miss Damos) Are you acquainted or have you received any training or specialized information as to how the Cadillac Division of General Motors Corporation identifies or puts the vehicle identification number on its cars?

"A Yes, ma'am. I have checked it with the Coulter Cadillac in Phoenix, how the numbers are stamped, every year. I check those out to see how they are stamped.

"Q You physically do this?

"A Yes, ma'am.

"Q It's information you gain with your own eyes, or is it information that is given to you by the dealer?

"A No, I observe these personally.

"Q And did you observe them in the 1965 model of Cadillacs?

"A Yes, ma'am."

This was not knowledge based on observation of one car. It is respectfully submitted the evidence was properly admitted. Admission of expert testimony lies in the sound discretion of the Court and the Judge's discretion is reviewable only for abuse. *McCormick on Evidence*, § 13, page 29, (please see pages 59 through 61 of the Reporter's Transcript for his, Metzger's, qualifications).

The secret number that was found on the 1965 Cadillac was the same as that on the Bycraft Cadillac stolen in Chicago. It is respectfully submitted it was the stolen Bycraft Cadillac as the jury found.

Burns was impeached by his two felony convictions and by his denial of the statement made to the FBI Agents as to how he acquired the car. As was stated by this Circuit in *Schino v. United States*, supra, at page 72:

"[10-12] Appellants each assert that, as to himself, the evidence is insufficient to support the verdict. In determining this question, we must consider the evidence in the light most favorable to the government. *Glasser v. United States*, 315 U.S. 60, 68, 62 S.Ct. 457, 86 L.Ed. 680; *Woodard Laboratories v. United States*, 9 Cir., 198 F.2d 995. Viewed in this light, the state of the evidence is such that a juror's reasonable mind 'could find that the evidence excludes every reasonable hypothesis but that of guilt'. In such a situation, the case must be submitted to the jury, and their decision is final. *Remmer v. United States*, 9 Cir., 205 F.2d 277, 287-288, and cases cited. The theory upon which appellants rely, that in a circumstantial evidence case a conviction cannot be supported if the evidence is as consistent with innocence as

with guilt, has been laid to rest in this circuit by the Remmer case, at least where, as here, the question arises on a motion for a judgment of acquittal.”

False exculpatory statements are evidence of guilty knowledge. *Young v. United States*, (9th Cir., 1966), 358 F.2d 429, at p. 431.

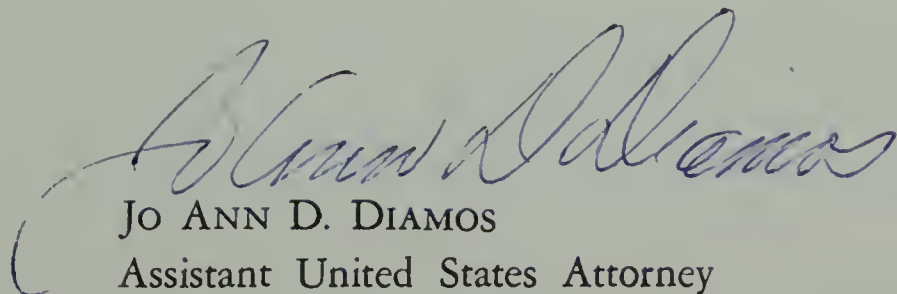
V.

CONCLUSION

It is respectfully submitted that the verdict was supported by substantial, admissible evidence.

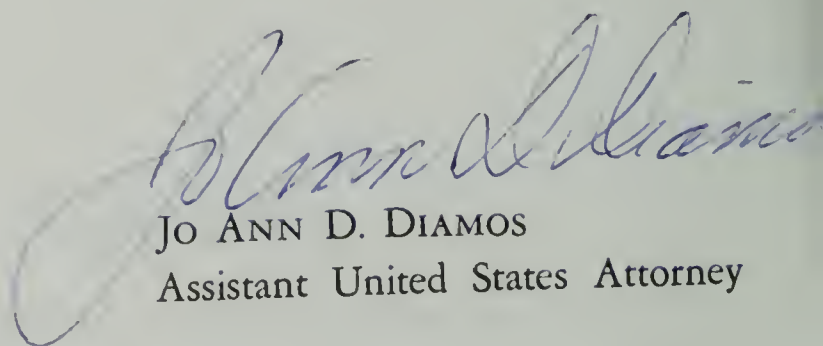
Respectfully submitted,

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I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.



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Three copies of the within Brief of Appellee mailed this
.....^{6th}..... day of September, 1967, to:

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